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## R STREET POLICY STUDY NO. 34

March 2015

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# THREE STEPS FOR REASSERTING CONGRESS IN REGULATORY POLICY

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## EXECUTIVE SUMMARY

Each year, federal agencies produce more regulations. These regulations affect nearly every aspect of our lives, yet are never voted on by Congress. This is a remarkable and troubling development for the separation of powers. Regulations have the effect of law. Thus, Congress' mostly hands-off approach to regulation has ceded a huge amount of its lawmaking authority to the executive branch, often with deleterious consequences.

This is regrettable. Congress has a duty to see to it that federal regulations comport with the law. Additionally, individual members would better serve their constituents by re-asserting their authority in regulatory policy.

Congress should take three steps to reclaim its legislative power. Leadership in both chambers can re-engage legislators' interest by regularly notifying them of new proposed

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rules and pending final rules. Leadership offices may do this themselves or establish a congressional task force to monitor the *Federal Register* and notify members. Next, Congress can use the Congressional Review Act to halt some rules from taking effect. It empowers any representative or senator to introduce a resolution of disapproval that, if approved by both chambers and the president, would overrule the regulation before it takes effect. Finally, Congress can enact legislation like the REINS Act, which has been introduced in several recent sessions of Congress. REINS (Regulations from the Executive In Need of Scrutiny) legislation would require congressional votes of approval before the most-costly and significant regulations could take effect.

## MORE AND MORE REGULATIONS

On average, more than 4,000 new regulations take effect each year and another 2,700 are proposed (Table 1). Few of these regulations are ever abolished. Over time, this process of "regulatory accumulation" has led the *Code of Federal Regulations*, the corpus of current federal rules, to balloon to more than 170,000 pages.<sup>1</sup> Complying with government demands for information and records costs the public nearly \$70 billion annually and takes about 10 billion hours each year.<sup>2</sup>

1. Patrick A. McLaughlin and Richard Williams, "The Consequences of Regulatory Accumulation and a Proposed Solution," Mercatus Center, working paper no. 14-03, February 2014. [http://mercatus.org/sites/default/files/McLaughlin\\_RegulatoryAccumulation\\_v2.pdf](http://mercatus.org/sites/default/files/McLaughlin_RegulatoryAccumulation_v2.pdf)

2. Office of Management and Budget, Office of Information and Regulatory Affairs, "Inventory of Currently Approved Information Collections," Feb. 9, 2015. <http://www.reginfo.gov/public/do/PRAReport?operation=11>

TABLE I: NEW FEDERAL REGULATIONS, 1993-2013

Year	Final rules issued	Proposed rules
1993	4,369	3,207
1994	4,867	3,372
1995	4,713	3,339
1996	4,937	3,208
1997	4,584	2,881
1998	4,899	3,042
1999	4,684	3,281
2000	4,313	2,636
2001	4,132	2,512
2002	4,167	2,638
2003	4,148	2,538
2004	4,101	2,430
2005	3,943	2,257
2006	3,718	2,346
2007	3,595	2,308
2008	3,830	2,475
2009	3,503	2,044
2010	3,573	2,439
2011	3,807	2,898
2012	3,708	2,517
2013*	3,659	2,594
Average	4,155	2,712

Source: *Federal Register*

\*Most recent year for which reliable aggregate figures are available.

Multiplying regulations usually are a symptom and product of the growth of government.<sup>3</sup> Every time a new entitlement, program, initiative or agency is birthed, more regulations ensue. When agencies decide to use their existing powers to expand the scope of their activities, more regulations tend to follow.<sup>4</sup>

New regulations are not *ipso facto* bad. Some regulations are welcome and critical to the achievement of a law's objectives. For example, the 1996 Personal Responsibility and

3. Agencies also must issue rules to for mundane operational matters that lack national significance, such as altering the hours a drawbridge operates. For example, see Department of Homeland Security, Coast Guard, "Drawbridge Operation Regulations; Gulf Intracoastal Waterway, St. Petersburg Beach, FL," 79 *Federal Register* 46740, Aug. 11, 2014. <http://www.gpo.gov/fdsys/pkg/FR-2014-08-11/pdf/2014-18868.pdf>

4. Economic development and new technologies are two factors that have spurred new regulations, along with the appointment of permanent regulators to respond to such developments. Forty years ago, there were no cell phones. Today, there is an entire Wireless Communications Bureau of the Federal Communications Commission. America's regulatory system is essentially reactive. Michael Mandel and Diana G. Carew, "Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform," Progressive Policy Institute, May 2013, pp. 3-4. <http://www.progressivepolicy.org/2013/05/regulatory-improvement-commission-a-politically-viable-approach-to-u-s-regulatory-reform/>

Work Opportunities Reform Act required welfare recipients to work in exchange for benefits. This was a significant policy change, which required the Department of Health and Human Services to issue regulations to state and local welfare agencies clarifying what constituted "work" and how to enforce this new recipient obligation.<sup>5</sup> Similarly, when existing rules are not working well, an agency should propose new ones that will better achieve the statute's objective.

In a best-case scenario, new rules clarify how a law should operate in practice. New regulations should not expand the scope of the law as written, nor convey new powers to government beyond those explicated in the statute.

But this is not how rulemaking always works in practice. Too often, rulemaking can go awry and produce unaccountable, extra-legal government.

## REGULATIONS AND UNACCOUNTABLE GOVERNMENT

Congress has myriad responsibilities, and regulatory policy tends to rank low on its priority list. This is unfortunate.

Regulations represent the nexus between the law and the American public. Regulations touch nearly every aspect of our lives in ways big and small. "Rulemaking" sounds boring and innocuous, but federal rules are no trifling matter. They have the effect of law because they are issued consequent to a law, and agencies that issue regulations usually are empowered to enforce them. Individuals accused of wrongdoing by a federal agency may be fined, have their property seized or face imprisonment. Likewise, businesses may suffer financial penalties, lose their license to operate or be shutdown.<sup>6</sup>

As such, Congress must keep an eye out for the public's interests. The U.S. Constitution establishes a principal-agent relationship between the first and second branches of government. Congress legislates, and the executive effectuates the laws. To ensure faithful execution of the law, Congress must closely watch agencies' implementation.

For a variety of reasons, federal agencies have issued rules that go far beyond the plain language of the law.<sup>7</sup> In June 2014,

5. On PRWORA (P.L. 104-193; 110 Stat. 2105) and its final rules, see <http://www.acf.hhs.gov/programs/ofa/programs/tanf/laws-regulations>. For an illustration of the complexity of implementing PRWORA, see Lawrence M. Mead, *Government Matters: Welfare Reform In Wisconsin* (Princeton University Press, 2005).

6. In the past few years, the Federal Motor Carriers Administration has shuttered more than three dozen small bus companies, alleging them to be unsafe. Jim Epstein, "Why the Government Was Wrong to Shut Down the Fung Wah Bus Company," *Reason.com*, July 16, 2013. <http://reason.com/archives/2013/07/16/why-the-government-was-wrong-to-shutdown>

7. The motives vary from agency to agency. Law enforcement agencies, for example, have strong incentives to reach beyond the letter of the law to fight crime at the cost of respecting civil liberties. Self-funding government agencies, such as the U.S. Postal Service, have incentives to issue rules that better enable it to profit.

the Supreme Court struck down the Environmental Protection Agency's "tailoring rule," which targeted greenhouse gas emissions. The agency's regulation had been challenged for being contrary to the plain language of the statute.<sup>8</sup> This case was not an anomaly. Court challenges have invalidated more than a dozen regulations in recent years, issued by agencies ranging from the Department of Health and Human Services to the Securities and Exchange Commission.<sup>9</sup>

Furthermore, Congress both intentionally and unintentionally encourages unaccountable government-by-regulation. The former occurs when the legislature writes statutes that expressly delegate authority over key policy decisions to bureaucrats. The Patient Protection and Affordable Care Act, known colloquially as "Obamacare," offers a prime example.<sup>10</sup> Shortly after its enactment, the nonpartisan Congressional Research Service identified more than 40 provisions of the statute that explicitly authorized agencies to make new regulations.<sup>11</sup>

The U.S. Constitution, as the *Wall Street Journal* wryly observed, "vested Congress with the duty to make laws, not to make vague suggestions about what it might be good for the law to be."<sup>12</sup> Yet, Congress often writes statutes that are maddeningly vague, inviting agencies to invent public policy through rulemaking procedures that give opaque and confused laws meaning and teeth.<sup>13</sup> One egregious example is the 1990 revision of the Clean Air Act. The House and Senate failed to fully reconcile discrepancies between their respective versions of the bill and, astonishingly, both became law. This ambiguity is not without consequence. The EPA has used it to justify issuing its proposed Clean Power Plan, a regulatory behemoth that would "fundamentally restructure the nation's electricity sector."<sup>14</sup>

8. *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427 (2014). [http://www.supremecourt.gov/opinions/13pdf/12-1146\\_4g18.pdf](http://www.supremecourt.gov/opinions/13pdf/12-1146_4g18.pdf)

9. Sam Baktins, "President's Regulatory Record In the Courts," American Action Forum, undated. <http://americanactionforum.org/research/presidents-regulatory-record-in-the-courts>

10. P.L. 111-148; 124 Stat. 119.

11. Curtis W. Copeland and Maeve P. Carey, "Upcoming Rules Pursuant to the Patient Protection and Affordable Care Act," Congressional Research Service, Report R41586, Jan. 13, 2011. [http://assets.opencrs.com/rpts/R41586\\_20110113.pdf](http://assets.opencrs.com/rpts/R41586_20110113.pdf)

12. Editorial, "The Congressional Accountability Act," *Wall Street Journal*, January 14, 2011. <http://www.wsj.com/articles/SB10001424052970203525404576049703586223080>

13. One long-term observer of Congress and regulation wrote: "Congress is often unable or unwilling to agree on anything beyond such velleities as 'protect the public health.' Here is Congress's mandate to the Consumer Financial Protection Bureau created by Dodd-Frank: '[E]nsure that all consumers have access to markets for consumer financial products and services...[that are] fair, transparent, and competitive.' In these cases, the agencies make the hard policy choices. They are the lawmakers." Christopher DeMuth, "The Regulatory State," *National Affairs*, issue 12, summer 2012. <http://www.nationalaffairs.com/publications/detail/the-regulatory-state>

14. The EPA's action has found critics on both the right and the left. Respectively, see Brian H. Potts and David R. Zoppo, "Is the EPA's Proposed Clean Power Plan Legal?" *Regulation: The Cato Review of Business and Government*, Winter 2014-2014, vol. 37, no. 4, pp. 10-11; and Laurence Tribe, "The EPA's Clean Power Plan Is Unconstitutional," *Wall Street Journal*, Dec. 22, 2014. <http://www.wsj.com/articles/laurencetribetheepas>

Congress' general inactivity in rulemaking is especially problematic within our constitutional system. Congress is the first branch of government; it should lead in policymaking, but it defers daily to regulators. In the battle for governance, our legislature, the most democratic of the branches, has ceded immense power to the executive branch. Congress' abdication of regulatory oversight allows government to run riot at the expense of the public, feeding its disaffection with government.

## EACH MEMBER OF CONGRESS HAS AN INTEREST IN REGULATIONS

As a general premise, each member of Congress—whether or not he or she realizes it—has an interest in regulatory policy. This is true whether a member is a Democrat or a Republican, a liberal or a conservative. Active oversight of regulatory policy is a means for a congressman to represent the interests of his or her constituents. A new regulation on hunting and fishing in Alaska, for example, will be of interest to Alaska's congressional delegation.<sup>15</sup> Similarly, a proposed regulation that affects civil fines against mining companies will be of interest to legislators from states where mines operate and mine-workers live.<sup>16</sup> Any member with a policy interest of a national scope—say, housing policy—might want to understand why a new fee is charged on a Section 108 loan guarantee<sup>17</sup>

Thanks to the sheer magnitude of executive branch output, it is impossible for a member's constituents to avoid the effects of regulations. In 2014 alone, more than 2,300 proposed rules were issued, affecting American life from aviation safety to wage garnishment. Transportation-related regulations were particularly prolix last year. (Table 2)

TABLE 2: MOST PROLIFIC RULEMAKING AGENCIES IN 2014

Agency	Proposed rules
Department of Transportation	506
Federal Aviation Administration	440
Environmental Protection Agency	439
Department of Commerce	182
National Oceanic and Atmospheric Administration	156

*Source: Federal Register*

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15. Department of Agriculture, Forest Service and Department of Interior, Fish and Wildlife Service, "Subsistence Management Regulations for Public Lands in Alaska; Rural Determination Process", 80 *Federal Register* 4521, Jan. 28, 2015. <http://www.gpo.gov/fdsys/pkg/FR-2015-01-28/pdf/2015-01621.pdf>

16. Mine Safety and Health Administration, "Criteria and Procedures for Assessment of Civil Penalties," 79 *Federal Register* 78749, Dec. 31, 2014. <http://www.gpo.gov/fdsys/pkg/FR-2014-12-31/pdf/2014-30578.pdf>

17. Department of Housing and Urban Development, "Section 108 Loan Guarantee Program: Announcement of Proposed Fee to Cover Credit Subsidy Costs and Solicitation of Comment," 80 *Federal Register* 6469. Feb. 5, 2015. <http://www.gpo.gov/fdsys/pkg/FR-2015-02-05/pdf/2015-02261.pdf>

FIGURE I: THE FEDERAL REGISTER'S REGULATION INTERFACE

The screenshot shows the Federal Register website. At the top, there is a logo for the National Archives and Records Administration (NARA) and a sign-in/sign-up link. The main header reads "FEDERAL REGISTER" with the subtitle "The Daily Journal of the United States Government". Below the header, there is a search bar with the placeholder "Search term or citation" and a "Find" button. To the right of the search bar are links for "SUBSCRIBE" and "Other Formats: CSV/Excel, JSON". Below the search bar, there are links for "Documents", "Public Inspection 139", "Events 4,877", and "Unified Agenda Items 2,384". A "Search Documents" button is prominently displayed. The search results are filtered by "Type: Proposed Rule" and "Publication Date: on 02/05/2015". The results are listed under "DOCUMENTS FOUND 14". The results are categorized into "AGENCY", "TOPIC", and "SECTION". The "AGENCY" section lists various federal agencies with their counts: Environmental Protection Agency (5), Housing and Urban Development Department (2), Commerce Department (1), Consumer Financial Protection Bureau (1), Federal Communications Commission (1), and a "[more]" link. The "TOPIC" section lists topics with their counts: Reporting and recordkeeping requirements (8), Administrative practice and procedure (6), Environmental protection (5), Air pollution control (4), Intergovernmental relations (3), and a "[more]" link. The "SECTION" section lists a single entry: "Signature Brands, LLC: Filing of Color Additive Petition". The results are sorted by "RELEVANT", with "NEWEST" and "OLDEST" options available.

Source: *Federal Register*

Yet legislators frequently treat regulatory policy as an after-thought, an issue taken up only after someone alerts a congressman that a problematic regulation is afoot. Why this is the case is not difficult to discern: senators and representatives have many other pressing matters to consider, not least their own re-elections. They spend more days in their home districts and states than in Washington and devote relatively little of their time to legislating and oversight.<sup>18</sup> Congressional staff cannot pick up all the slack. Office staff sizes have been frozen for four decades, while the demands of constituents and media have skyrocketed.<sup>19</sup>

18. Congressional Management Foundation, "Life in Congress: The Member Perspective," (Washington: CMF, 2013), pp. 5-6. [http://www.congressfoundation.org/storage/documents/CMF\\_Pubs/life-in-congress-the-member-perspective.pdf](http://www.congressfoundation.org/storage/documents/CMF_Pubs/life-in-congress-the-member-perspective.pdf)

19. Ida Brudnick, *Congressional Salaries and Allowances*, Congressional Research Service, Report RL30064, December 30, 2015. [http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C\\*PL%5B%3D%23P%20%20%0A](http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C*PL%5B%3D%23P%20%20%0A); and Shawn Zeller, "Congress Is Good at Shrinking One Part of Government," *Roll Call*, January 20, 2015. [http://www.rollcall.com/news/congress\\_is\\_good\\_at\\_shrinking\\_one\\_part\\_of\\_government-239368-1.html](http://www.rollcall.com/news/congress_is_good_at_shrinking_one_part_of_government-239368-1.html)

Power abhors a vacuum, so the executive branch has moved into the legislative space abandoned by Congress. Agencies increasingly are the nation's lawmakers, finalizing about 80 new rules per week and proposing another 50 new regulations.

For sure, congressional committees can and do hold hearings on regulation and members can and do participate in public comment periods when new rules are proposed. But with so many regulations being issued so frequently, these efforts are insufficient. For its own good and the good of the country, Congress can and should devote more time to regulation. As shown below, doing so would not require inordinate amounts of time.

## STEP I: ENGAGE MEMBER INTEREST IN REGULATIONS

Leadership in both chambers could heighten congressional attention to regulatory policy—individually and collectively—by making it a regular subject of communication.<sup>20</sup> Congressional leadership should task a handful of staff to spend a modest amount of time each week reviewing the *Federal Register* for new and finalized rules and sending out “regulation alerts” to all members and committees, regardless of party.

This process would not require much effort. The *Federal Register*’s website helpfully posts final and proposed rules daily.<sup>21</sup> Its interface tags regulations by issuing agencies and policy areas, and allows anyone easily to extract and share the most recent proposed and final regulations. (Figure 1)

In order to keep this weekly missive a brief read, alerts could contain only the capsule summary for each forthcoming or final rule, including the title, subject and issuing agency. This information can answer the basic threshold question for a member or committee: is this a subject of concern? Where it is, one can click through to read the regulation’s complete text.

Over time, one can imagine the development of a more sophisticated regulatory alert system, personalized for each member office and committee. Data from *FederalRegister.gov* could be crawled and categorized to enable the generation of notifications germane to members’ specific interests. For example, a new rule affecting the Nuclear Regulatory Agency might be sent to the committees of jurisdiction, their members and any other congressional office that either has nuclear industries in its state or district and/or an expressed interest in the subject.<sup>22</sup>

## STEP 2: USE THE CONGRESSIONAL REVIEW ACT

The Congressional Review Act is a tool that allows any member of Congress to encourage further scrutiny, and potential preemption, of any proposed rule.<sup>23</sup> The CRA requires each final rule flagged by a member to be submitted to both chambers of Congress, along with any cost-benefit analysis and a report detailing whether the regulation comports with various rulemaking statutes, such as the Unfunded Mandates Reform Act of 1995. The Government Accountability Office, which also receives this paperwork, then must provide a report to Congress within 15 days. GAO’s assessment

is intended to clarify whether the agency did, in fact, follow all appropriate procedures when producing the rule.

Any member may introduce a resolution of disapproval to declare the rule invalid. Congress has 60 days from the agency’s initial submission of the rule to pass a disapproval resolution and deliver it to the president’s desk. If the resolution is signed, the rule does not take effect, and the agency that issued it may not attempt to issue a substantially similar version of the rule.<sup>24</sup> The CRA applies to all agencies, including independent regulatory agencies.

Congress adopted the CRA in 1996 in recognition that it needed to reassert its role in regulation.

As more and more of Congress’ legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments. In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help redress the balance, claiming for Congress some of its policy making authority, without requiring Congress to become a super regulatory body.<sup>25</sup>

While Republicans led the charge for the CRA, it also had support from Democrats, including President Bill Clinton, who signed it into law. It was lauded by Sen. Carl Levin, D-Mich., a strong advocate for the CRA. No longer would citizens have to resort to the courts to stop an onerous or unjust rule, he declared. “Now we are in a position to do something ourselves. If a rule goes too far afield from the intent of Congress...we can stop it. That’s a new day, and one a long time coming.”<sup>26</sup>

Unfortunately, the CRA has not rebalanced power between the branches. In nearly 20 years, Congress has stopped only one final rule via the CRA. This occurred in 2001, when President George W. Bush signed a resolution abolishing ergonomic rules proposed by the Occupational Safety and Health Administration under his predecessor, President William J. Clinton.

20. Alternatively, each chamber could form a caucus, task force, or other regular working group.

21. <https://www.federalregister.gov/>

22. *Federal Register.gov* itself already allows anyone, congressman or not, to craft fine-toothed searches for rules. These searches can be saved as “subscriptions,” which will trigger e-mail notifications whenever a rule is issued that meets the search criteria.

23. 5 U.S.C. 801-808.

24. For additional details, see Richard S. Beth, “Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act,” Congressional Research Service, Report RL31160, Oct. 10, 2001. [http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C\\*P%5C\\_%3D%22P%20%20%0A](http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C*P%5C_%3D%22P%20%20%0A)

25. Joint Explanatory Statement of House and Senate Sponsors, 142 *Congressional Record*, April 19, 1996, p. E575. <https://www.congress.gov/congressional-record/1996/04/19/extensions-of-remarks-section/article/E571-1>

26. Sen. Carl Levin, “Congressional Review and Small Business Regulatory Fairness Act,” 142 *Congressional Record*, March 28, 1996, p. S3123. <https://www.congress.gov/crc/1996/03/28/CREC-1996-03-28-pt1-PgsS3114-2.pdf>

Why has the CRA killed so few rules? A common hypothesis is that the CRA is simply too weak and too cumbersome. According to this explanation, legislators see no point in trying to stop a regulation, because doing so is futile. The notion is that the president inevitably will veto any rule-killing legislation, since his appointee oversees the agency issuing the rule. Congress then would need to muster a two-thirds majority in both chambers to override the veto.<sup>27</sup>

This hypothesis holds some truth, but does not account for a surprising fact: members of Congress rarely even bother to introduce CRA resolutions.

Congressmen frequently introduce legislation they know will never be enacted. They drop “hopeless cause” bills to notify their colleagues that they want to be a player on a policy issue, and to please constituents and their supporters by fighting the good fight. They also introduce long-shot legislation to draw political lines between themselves and others, including the president.

For any senator or representative, drawing up a CRA resolution is essentially cost-free. The resolutions themselves are brief and simply worded, following a statutorily prescribed template. For example, the legislation striking down the Clinton-era ergonomic standards reads in its entirety:

Joint resolution disapproving the rule of the Occupational Safety and Health Administration relating to ergonomics. Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress disapproves the rule submitted by the Occupational Safety and Health Administration on November 14, 2000 (65 Fed. Reg. 68,261 et seq.) relating to ergonomics, and such rule shall have no force or effect.

Yet, during the 113th Congress, from January 2013 to January 2015, just two CRA resolutions of disapproval were introduced in the House and none were introduced in the Senate. This number looks all the more paltry when compared to the roughly 7,000 final rules issued during this same period.<sup>28</sup>

Hence, a more persuasive hypothesis for the non-use of the CRA is that most legislators likely are either unaware of this tool or do not recognize its utility to their re-election

27. For discussion of the CRA's limitations, see “The Mysteries of the Congressional Review Act,” *Harvard Law Review*, vol. 122, June 1, 2009. [http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/vol\\_122\\_the\\_mysteries.pdf](http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/vol_122_the_mysteries.pdf); and Morton Rosenberg, “The Congressional Review Act After 15 Years: Background and Considerations for Reform,” draft report, Administrative Conference of the United States, Sept. 16, 2011, pp. 16-48. <http://www.acus.gov/sites/default/files/documents/COJR-Draft-CRA-Report-9-16-11.pdf>

28. National Archives and Records Administration, “Federal Register Document Pages Annual Percentage Change, 1976-2013,” p. 4. <https://www.federalregister.gov/uploads/2014/04/OFR-STATISTICS-CHARTS-ALL1-1-2013.pdf>

interests. Indeed, most current members of Congress have tenures that began fewer than 20 years ago, when the CRA became law.<sup>29</sup>

Introducing a CRA resolution is advantageous to any congressman, if only to signal to fellow legislators, the media and the public one's interest in a subject. Certainly, committees wield great influence over their issues of jurisdiction. But in today's Congress, anyone can become a player on any issue.<sup>30</sup> The days of committee chairs leading and other legislators dutifully following have long passed. When Congress is largely gridlocked, each member's vote is valuable to leadership trying to round-up support for its signature initiatives.

Additionally, even if a CRA resolution is not enacted into law, it still can modify or stop a regulation. Sen. Roger Wicker, R-Miss., for example, used a CRA resolution to negotiate language to thwart an OSHA regulation affecting small businesses. The then-House member rallied allies to insert contrary language into a Fiscal Year 1998 appropriations bill.<sup>31</sup> Similarly, in 2008, then-Sen. John D. Rockefeller, D-W.Va., used the CRA to garner support for legislation overturning regulations to alter eligibility for the State Children's Health Insurance Program.<sup>32</sup>

### STEP 3: ENACT REINS-TYPE LEGISLATION

The Congressional Review Act is a tool ready to be used. However, the CRA has its limitations. The statute provides fast-track consideration in the Senate, but not in the House. This means passing CRA resolutions in the statutorily defined 60-day time frame is difficult.<sup>33</sup> Additionally, the House and Senate both have very limited calendar time. In any one session, leadership may not be willing to schedule more than a modest number of CRA resolution votes.

29. Matthew Glassman and Amber Wilhelm, “Congressional Careers: Service Tenure and Patterns of Member Service, 1789-2015,” Congressional Research Service, Report R41545, Jan. 3, 2015. <https://www.fas.org/sgp/crs/misc/R41545.pdf>

30. Sen. Mike Lee, R-Utah, has become a force in tax policy despite his short tenure and not serving on the Finance Committee. See Michael Warren, “The Non-Candidate,” *Weekly Standard*, Feb. 9, 2015, p. 27. On the loss of committee dominance of issue areas, see Walter J. Oleszek, “The Evolving Congress: Overview and Analysis of the Modern Era,” in U.S. Senate, Committee on Rules and Administration, *The Evolving Congress*, 113<sup>th</sup> Congress, 2nd session, S. Prt. 113-030, December 2014. <https://www.scribd.com/doc/248179165/CRS-The-Evolving-Congress-December-2014>. On the rise of less orderly congressional policymaking, see John W. Kingdon, *Agendas, Alternatives, and Public Policies*, Longman, 1994.

31. Morton Rosenberg, *The Congressional Review Act After 15 Years: Background and Considerations for Reform*, p. 13.

32. *Ibid.*, p. 15.

33. The hurdles to enacting a CRA disapproval resolution are all the more difficult when Congress's two chambers are controlled by different parties with competing agendas.

The recent case of the Federal Communications Commission and “net neutrality” rules is illustrative of the challenge.<sup>34</sup> As the R Street Institute’s Cameron Smith observed:

The Federal Communications Commission does not have direct legislative authority or instructions from Congress on how to handle the issue. President Obama has suggested that the FCC extend its authority over telephone companies (found in Title II of the Communications Act) to Internet service providers in order to implement net neutrality rules. The problem is that Title II was enacted in 1934. In other words, the President is suggesting that the FCC write a critical rule with massive economic implications by “interpreting” an 80-year-old delegation of congressional authority.<sup>35</sup>

A member of Congress might introduce a CRA resolution to preempt the FCC’s rulemaking, but it is certain to be vetoed by President Barack Obama, since the FCC is acting at his behest. This is not how our constitutional system was designed to work. The Constitution grants “all legislative powers” to the Congress, not to a bureaucracy directed by a president.

As an additional tool, Congress should establish a policy that would require congressional approval of the most significant regulations before they take effect. Such a policy should be limited to a handful of regulations that have substantial, tangible costs to the public or the private sector.

The idea of legislative pre-review of regulations is not novel. Connecticut, for example, has a Legislative Regulation Review Committee that approves regulations before they take effect.<sup>36</sup>

Congress repeatedly has debated proposals for such an approval mechanism. The Taxpayers’ Defense Act was introduced in the 106<sup>th</sup> Congress in 1999.<sup>37</sup> The bill would have required Congress to approve via authorizing legislation any regulation that would raise or expand a tax.

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34. Federal Communications Commission, “Protecting and Promoting the Open Internet,” 79 Federal Register 37448, July 1, 2014. <http://www.gpo.gov/fdsys/pkg/FR-2014-07-01/pdf/2014-14859.pdf>

35. Cameron Smith, “The REINS Act: Increasing The Accountability Of Our Elected Officials,” Forbes.com, Jan. 12, 2015. <http://www.forbes.com/sites/realspin/2015/01/12/the-reins-act-increasing-the-accountability-of-our-elected-officials/>

36. “It is the responsibility of the Legislative Regulation Review Committee to review regulations proposed by state agencies and approve them before regulations are implemented. This position was adopted since all regulations have the force of law, and it is important that regulations do not contravene the legislative intent, or conflict with current state or federal laws, or state or federal constitutions.” <http://www.cga.ct.gov/rr/>

37. H.R. 2636. See also U.S. Congress, House of Representatives, Committee on the Judiciary, “Reinvented Taxation and the Taxpayer’s Defense Act”, hearing before the Subcommittee on Commercial and Administrative Law, 106<sup>th</sup> Congress, 1<sup>st</sup> session, July 29, 1999. [http://commdocs.house.gov/committees/judiciary/hju63857.000/hju63857\\_0f.htm](http://commdocs.house.gov/committees/judiciary/hju63857.000/hju63857_0f.htm)

A more broadly targeted regulatory review process is proposed in the Regulations from the Executive In Need of Scrutiny Act. First introduced in 2009, versions of the bill were passed by the House overwhelmingly in both 2011 and 2013.<sup>38</sup> REINS bills also were introduced in the House and Senate in the first month of the current 114<sup>th</sup> Congress.<sup>39</sup>

REINS bills have varied in their particulars, but their essence has been to flip the regulatory toggle to disallow proposed rules. Before an agency could implement a major rule, defined as one whose effects on the economy would be greater than \$100 million, Congress must approve the rule.<sup>40</sup> Both chambers would have expedited procedures to pass a congressional resolution of approval within a set deadline, defined as 70 days in the most recent iteration of the bill. If Congress fails to act, the regulation does not take effect. If the rule deals with the enforcement of criminal laws, national security or an international trade agreement, the president would be allowed to authorize implementation of the rule for 90 days. Absent subsequent congressional approval, the regulation would cease to have effect.

By one count, Congress would have had to vote on 84 rules last year if REINS-type legislation had been in place.<sup>41</sup> To address concerns about the feasibility for Congress to schedule floor time for each of these approval resolutions, the number could be reduced further if the REINS legislation was redrafted. For example, regulations that trigger costs due to the transfer of money could be exempted from coverage.<sup>42</sup> Or, a REINS-type statute could limit itself only to those rules that have a net cost to the economy, rather than a total effect, of \$100 million or more.<sup>43</sup>

REINS-type legislation would force regulatory oversight back onto Congress’ legislative calendar. It also would, as the Heritage Foundation characterized it, help ensure “that regulators are exercising their delegated powers in a way consistent with the intent of Congress” and that “Congress

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38. H.R. 10 (112<sup>th</sup> Congress); H.R. 367 (113<sup>th</sup> Congress).

39. H.R. 427; S. 226.

40. Per 5 U.S.C. §804(2), a major rule is one with “(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.”

41. Cameron Smith, “The REINS Act: Increasing The Accountability Of Our Elected Officials,” Forbes.com.

42. A report found that of the 100 major rules issued in 2010, 34 were major only because they involved transfers (e.g., crop insurance payments). Curtis W. Copeland and Maeve Carey, “REINS Act: Number and Types of ‘Major Rules’ in Recent Years,” Congressional Research Service, Report R41651, Feb. 24, 2011. [http://www.speaker.gov/sites/speaker.house.gov/files/UploadedFiles/110830\\_crs\\_majormajors.pdf](http://www.speaker.gov/sites/speaker.house.gov/files/UploadedFiles/110830_crs_majormajors.pdf)

43. As noted above, a rule is deemed “major” if its effect (either positive or negative) exceeds \$100 million.

itself can be held accountable for the regulations and consequences of that result.”<sup>44</sup> Additionally, required congressional approval would stop vaguely written statutes from being implemented. Finally, enacting congressional review of the biggest, most significant rules would force Congress to re-engage in regulatory policy by inserting the subject into the two chambers’ to-do lists. Many major regulations are not controversial. In order to maintain the orderly functioning of some government programs, Congress would have to hold rapid votes on these regulations.<sup>45</sup>

## CONCLUSION

In the two months since the 114<sup>th</sup> Congress began, more than 200 new rules have been proposed and 260 have been finalized.<sup>46</sup> Some of the forthcoming regulations are very significant, such as the Department of Education’s “gainful employment” rule for higher education and student aid,<sup>47</sup> the EPA’s “existing secondary source” greenhouse gas regulations<sup>48</sup> and the aforementioned FCC rulemaking on Internet neutrality.

Whatever one’s views on any forthcoming regulations, the public’s elected representatives have a constitutional duty and an electoral interest to give regulations regular scrutiny.

## ABOUT THE AUTHOR

**Kevin R. Kosar** is the director of the governance project and a senior fellow at the R Street Institute. His research currently focuses on Congress and its operation within the American constitutional system, and a variety of policy issues.

Prior to joining the R Street Institute, Kevin was a research manager and analyst at the Congressional Research Service, an agency within the Library of Congress for over a decade. There, he advised members of Congress and committees.

Kevin is the author of *Ronald Reagan and Education Policy, Failing Grades: The Federal Politics of Education* and *Whiskey: A Global History*. He has testified before Congress, and published reports and essays on education policy, quasi-governmental entities, privatization and government communications and propaganda. His work has appeared in scholarly and professional journals, such as *Presidential Studies Quarterly*, *Public Administration Review*, and *Federal History*; and in popular media, including *The Weekly Standard* and *Washington Monthly*, and newspapers such as the *Chicago Sun-Times*, *Philadelphia Inquirer* and *Roll Call*.

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44. James Gattuso, “Taking the REINS on Regulation,” Heritage.org, Oct. 12, 2011. <http://www.heritage.org/research/reports/2011/10/taking-the-reins-on-regulation>

45. A number of critics accuse Congress, not unfairly, of wanting “to have the regulatory issue but not own it.” It does this by ignoring rulemaking except in rare instances where it is politically advantageous to make hay. A REINS-type statute would curb some of this opportunism by reducing plausible deniability.

46. Data as of Feb. 9, 2015.

47. Department of Education, “Program Integrity: Gainful Employment,” 79 *Federal Register* 16426, March 25, 2014. <http://www.gpo.gov/fdsys/pkg/FR-2014-03-25/pdf/2014-06000.pdf>

48. Environmental Protection Agency, “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” 79 *Federal Register* 34830, June 18, 2014. <http://www.gpo.gov/fdsys/pkg/FR-2014-06-18/pdf/2014-13726.pdf>